Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1414

GERALDINE ROBESON, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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March 7, 1979

INDEX

Page

Opinion Below.....1

Jurisdiction.....1

Questions Presented.....2

Statutory Provisions Involved.....2

Statement of the Case.....2

Reasons for Granting the Writ.....5

1. The Ninth Circuit Jurisdictional Dismissal Conflicts with the Decisions in other Federal Courts.....5

(A) Does the Petition for Review in the Instant Case fall within the Terms of the Statute Providing for Judicial Review of NLRB Orders?.....6

(I) Is Petitioner a "person aggrieved" within the meaning of Section 160(f)?.....7

(II) Was there a "Final Order" of the Board?...10

(B) Is there any Express Statutory Exemption to the General Power of Review Created by Section 160(f)?..12

2. The Ninth Circuit Jurisdictional Dismissal Raises Important Questions of Statutory Law.....14

Conclusion.....18

Appendix

Order of Dismissal I

Denial of Rehearing II

CITATIONS

Cases	Page
Albrecht v. NLRB, 181 F.2d 652	7,8,9
Anthony v. NLRB, 132 F.2d 620	7,9,10
International Ladies Garment Workers, Local 415-475 v. NLRB, 501 F.2d 823	11,14
Kovach v. NLRB, 229 F.2d 138	7,9,10
Leeds and Northrup v. NLRB, 357 F.2d 527	10,11
Lincourt v. NLRB, 170 F.2d 306	13.14

Statutes	
Labor Management Relations Act, 1947, 61 Stats 136	13
Title 29 U.S.C., Section 153(d)	13
Title 29 U.S.C., Section 160(f)	2,4,6,7, 9,11,12, 14,15,17, 18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, GERALDINE ROBESON, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit dismissing Petitioner's petition filed therein for lack of jurisdiction, which order was entered on October 2, 1978.

OPINION BELOW

The Court of Appeals for the Ninth Circuit issued no opinion.

JURISDICTION

The order of dismissal of the Court of Appeals for the Ninth Circuit was entered on October 2, 1978. A timely peti-

tion for rehearing was denied on December 18, 1978 and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Under Title 29 of U.S.C. Section 160(f), did the Ninth Circuit Court of Appeals err in dismissing for lack of jurisdiction Petitioner's Petition for Review of an order by the National Labor Relations Board finding the charged party in compliance with a Board practices decision in which the Board had ordered reinstatement of Petitioner with back pay, but after which back pay was partially denied by decision of the General Counsel to the Board?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 160(f). Review of a final order of Board on petition to Court
>
> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals. . .

STATEMENT OF THE CASE

Petitioner herein, GERALDINE ROBESON, was discharged on June 18, 1975 from her clerical position with Retail Clerks Union

Local 588. On July 8, 1975, Petitioner filed a wrongful termination charge with the National Labor Relations Board. On February 20, 1976, the General Counsel for the National Labor Relations Board issued a complaint based upon the Petitioner's charge. The matter was heard before an administrative law judge on April 29, 30 and May 3, 1976.

The administrative law judge issued a decision on August 27, 1976 finding that the Retail Clerks Union had engaged in an unfair labor practice. The decision ordered that the Retail Clerks Union Local 588 reinstate Petitioner and make her whole for any monetary losses she suffered as a result of her termination.

On December 7, 1976, the administrative law judge's decision and order was affirmed and adopted by a three member panel acting as designated agents for the National Labor Relations Board.

Subsequent to the Board's adoption of the judge's decision, a Regional Compliance Officer administratively decided without a hearing that the Regional Director would not require back pay be paid to Petitioner for the period 6/19/75 through 4/30/76, on the basis Petitioner has made insufficient efforts to gain other employ-

ment. A compliance letter was thereafter issued on May 31, 1977 closing the case. On May 28, 1977, Petitioner wrote to the Regional Director to appeal the Compliance Officer's decision. The Regional Director declined to investigate the back pay decision further in his letter to Petitioner of July 18, 1977. Petitioner then wrote the General Counsel to appeal the Regional Director's decision.

On November 14, 1977 the General Counsel sent Petitioner a letter denying Petitioner's request to overturn the Regional Director's decision. On January 4, 1978, Petitioner, through her attorney, requested a back pay specification from the Regional Director. On January 11, 1978 the request was denied.

On April 17, 1978, Petitioner filed a petition with the Ninth Circuit Court of Appeals, invoking the court's jurisdiction under Title 29 U.S.C. Section 160(f) to review the Order of the Board given in the form of a General Counsel's Compliance letter stating that the Union had fully complied with the Board's order of December 7, 1976 including that portion requiring repayment of all "earnings or other monetary losses suffered by her", and the resultant decision to close NLRB

Case #20-CA-10401. Respondent moved to dismiss the petition for lack of jurisdiction. The Court of Appeals granted respondent's motion, dismissing the appeal on October 2, 1978 without issuing an opinion. Petitioner filed timely petition for rehearing, the rehearing was denied on December 18, 1978.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT JURISDICTIONAL DISMISSAL CONFLICTS WITH THE DECISIONS IN OTHER FEDERAL COURTS.

The Ninth Circuit Court of Appeals issued no opinion in dismissing Petitioner's Petition for Review of the NLRB action finding the charged party in compliance; and since the Circuits normally do not issue opinions when making a determination as to acceptance or rejection of jurisdiction, it is not possible to hold up other opinions in like cases in order to show the existence or non-existence of a direct conflict with the Ninth Circuit's action here. Rather, in order to demonstrate the existence of a conflict it is necessary to examine the grounds for jurisdiction provided by statute and show that in its dismissal of this case the Ninth Circuit must be held to have taken a position or positions on those statutory grounds which is in opposition to the courts of other circuits.

Petitions for Review are allowed and governed solely by the provisions of the statute in question here, Section 160(f) of Title 29 of the United States Code; and, therefore, the Ninth Circuit's decision must, in order to be in compliance with federal law, have been made on one of two bases: First, they could have felt that the Petition did not come within the terms of Section 160(f) and therefore did not qualify for review or; second, they might have felt that there existed a separate statute which exempted the actions which are the subject of the Petition from judicial review.

Regardless of whichever of these two areas the court chose to base its opinion, the Ninth Circuit's action stands in conflict either directly or in principle with the decisions of other Courts of Appeal.

(A) DOES THE PETITION FOR REVIEW IN THE INSTANT CASE FALL WITHIN THE TERMS OF THE STATUTE PROVIDING FOR JUDICIAL REVIEW OF NLRB ORDERS?

Within Section 160(f), there are two conditions which must be met in order to be entitled to judicial review. First, the Petitioner must be a "person aggrieved", and second, the aggravation must be the result of a "final order of the Board". Disagreements in all the circuits over whether a petition for review qualifies under Section 160(f) center around the

construction of these phrases. In the absence of an opinion Petitioner will show that the dismissal by the Ninth Circuit conflicts with the positions taken by other circuits in interpreting both of these terms.

(I) Is Petitioner a "person aggrieved" within the meaning of Section 160(f)?

The most likely basis for the Ninth Circuit's assertion that they have no jurisdiction is that they believe that Petitioneris not a "person aggrieved" within the meaning of Section 160(f). In a 1942 decision, Anthony v. NLRB, 132 F. 2d 620, the Ninth Circuit held that a workman who had been denied back pay and reinstatement was not a "person aggrieved" within the meaning of Section 160(f) so that the court had no jurisdiction to review the NLRB decision. The Anthony court reasoned that Congress had intended no individual right of action when it enacted the National Labor Relations Act.

In the 35 years since Anthony was decided, it has not been followed by any other circuit. The Seventh Circuit is the only other court to cite Anthony. It was cited and disapproved in Albrecht v. NLRB, 181 F.2d 652,655[1], and cited again and disapproved in Kovach v. NLRB, 229 F.2d 138,142.[2]

In Albrecht (at 654) the Seventh Circuit pointed out the fallacy in reasoning an individual had no right to appeal adverse NLRB actions. Speaking of a House Committee Report[3] upon which the NLRB had relied in arguing no private right of action the court said, "This quotation, however, considered in its relation with the rest of the report, makes it clear that the Committee, when

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1. In Albrecht fired employees brought an unfair labor practice charge against the employer. The NLRB found there was no unfair labor practice and the employees appealed to the Seventh Circuit. The employer intervened to challenge the court's jurisdiction on the premise the employees were not "persons aggrieved".

2. In Kovach an employee had challenged the employer's actions in laying him off. The Board dismissed the complaint. On appeal the company argued that the employee was not a person aggrieved.

3. House Committee Report, 74th Congress, 1st Session, Report No.1147, page 24. "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint."

it said 'no private right of action is contemplated' was referring to the right to institute an unfair labor practice proceeding, and did not mean that a person aggrieved by a final order of the Board entered at the conclusion of such a proceeding did not have a right to secure judicial review of that final order, as provided by Section 10(f) of the Act."

In Kovach the Seventh Circuit again disapproved of Anthony (at 143), saying, "The Company cites the case of Anthony v. NLRB, 9 Cir., 132 F.2d 620, in support of its argument that Kovach was not an aggrieved party. This court expressed its disapproval of the Anthony case in Albrecht. . .pointing out the fact that it had not been followed by any other Court of Appeals. We note that since the Anthony decision was handed down in 1942, it has not once been cited except with disapproval in the Albrecht case. We still choose not to follow the Anthony case."

As Anthony is a Ninth Circuit decision which has never been disapproved or overruled in the Ninth Circuit, it seems likely that the Anthony precedent would be the most probable grounds for the Ninth Circuit to dismiss Petitioner's case without opinion. As pointed out by

the Seventh Circuit in Kovach, no other circuit has followed Anthony and the Seventh Circuit expressly rejected the holding in Anthony. Anthony seems to represent the precise sort of abberation in the application of Federal law that this court is mandated to resolve.

(II) Was there a "Final Order" of the Board?

In Petitioner's NLRB case, the NLRB decision and order of December 7, 1976 required that Petitioner be reinstated to her position with the Retail Clerks Local 588 and that she be made whole for monetary losses incurred as a result of her termination. After the order, an administrative decision was made by the NLRB Regional Director's office not to press the back pay claim, and, accordingly, after Petitioner was reinstated, a compliance letter was issued closing the case.

To hold that there is no appealable "Final Order" in this situation conflicts in principle with the decision of the Third Circuit Court of Appeals in Leeds and Northrup v. NLRB, 357 F.2d 527 (1966). In Leeds the NLRB Regional Director informally settled an unfair labor practices charge, then withdrew the complaint. When the charging party ap-

pealed the settlement, the NLRB argued the Court of Appeals had no jurisdiction as the action appealed from was not a formal action, so the final order requisite to jurisdiction was absent. The court (at 351) responded that it was illogical to construe Section 160(f) as granting judicial review of formal decisions of the Board, but frustrating judicial review of decisions made by the Board's agents.

"The distinction of formal or informal final disposition under the facts of this case confuses incidence with substance. The absence of a formal order of the Board, which respondent insists is a fatal jurisdictional defect, does not preclude review by this court of a final disposition by an administrative agency."

The D.C. Circuit has also held that informal withdrawal of the complaint by the General Counsel is a reviewable Board action under Section 160(f) in International Ladies Garment Workers, Local 415-475 v. NLRB, 501 F.2d 823 (D.C. Circuit 1974)[4] thereby taking a position in opposition to this decision of the Ninth Circuit.

Both Leeds and Garment Workers can be distinguished from Petitioner's

case on the basis they involved informal action by the General Counsel prior to, and substituting for, formal Board action, whereas Petitioner's case involves General Counsel action after a formal Board order which modified the effect of the order. But the very fact of distinguishing the cases highlights the direct conflict in the reasoning. If a court can review, as a final order of the Board, an informal action of the General Counsel where no formal order is ever entered, then a fortiori, an informal action modifying the effect of a formal Board order, would be reviewable.

(B) IS THERE ANY EXPRESS STATUTORY EXEMPTION TO THE GENERAL POWER OF REVIEW CREATED BY SECTION 160(f)?

This third ground for dismissal is

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4. Petitioner could discover no cases which discuss the "final order" nature of administrative modifications to existing board orders. Perhaps understandable in light of the tenuous logic supporting an argument that there was no final order where the administrative action modified a board order, then the Board finalized it as modified with a compliance letter closing the case. Petitioner has discussed the "final order" argument only because it was suggested as an independent ground for dismissal to the Ninth Circuit and therefore could conceivably have been the basis for their opinion.

the only other possible one after dismissing the two more limited grounds dealt with above which grounds treat controversies surrounding the interpretation of terms used in the statute under discussion. If the Ninth Circuit's dismissal of the Petition for Review was not made on the basis of their interpretation of the statute, then they must have felt that there existed somewhere an express statutory exemption from review. If they did so feel, then their action is in conflict with the decisions of other circuit courts.

A review of the National Labor Relations Act reveals one express statutory exemption which effects the review of Board actions. In 1947, when Congress amended the National Labor Relations Act[5] to create the General Counsel's office, the General Counsel was granted ". . . final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaints before the Board. . ." Title 29 U.S.C. Section 153(d).

This language and the surrounding legislative history exempts from judicial review a General Counsel decision not to issue a complaint. Lincourt v. NLRB (First

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5. Labor Management Relations Act, 1947, 61 Stats. 136.

Cir. 170, F.2d 306). However, once a complaint has been filed and the administrative machinery is set in motion, the statutory scheme contemplates Board action which is clearly reviewable under 29 U.S.C. Section 160(f). International Garment Workers Union v. NLRB, supra, 501 F.2d 823. Once a complaint has issued, disposition of the complaint is a Board responsibility and General Counsel actions in the disposition of the complaint are acts as agents of the Board. Leeds and Northrup v. NLRB, supra, Third Circuit.

In Petitioner's case, the complaint had issued, and the Board had issued an order adopting the findings of the administrative law judge. General Counsel then made an administrative decision not to enforce the Petitioner's back pay claim without giving her any hearing whatsoever.

For the Ninth Circuit to dismiss for lack of jurisdiction on the basis that General Counsel's act was exempt from review would clearly conflict with the Garment Workers and Leeds decisions that informal General Counsel acts after the issuing of a complaint are subject to review under Section 160(f).

2. THE NINTH CIRCUIT JURISDICTIONAL DISMISSAL RAISES IMPORTANT QUESTIONS OF STATUTORY CONSTRUCTION IN FEDERAL LABOR LAW.

Petitioner's case illustrates first,

the necessity of judicial review of NLRB administrative actions and second, the importance of Supreme Court guidance on the scope of review granted the federal courts in Section 10(f) of the National Labor Relations Act, Section 160(f) of Title 29 U.S.C.

As to the first point, judicial review of NLRB administrative actions is made necessary because of the enormous power of the General Counsel's office who through personal fiat can determine rights and fashion remedies just as fully as the Board itself. Yet if the Ninth Circuit's dismissal in this case is allowed to stand the decisions of the General Counsel will not be subject to review while those of the Board itself will be subject to review. This unequal application of the law effects potentially every charging party for whom the NLRB issues a complaint.

In this case the administrative decision was made following, and in the enforcement of, an existing Board unfair labor practices order requiring that Petitioner be made whole from all monetary damages. The decision affected Petitioner's rights to back pay just as demonstrably as if she had been denied back pay by the full Board itself. Yet procedurally it was accomplished by administrative decision in the form of a compliance letter, which in the General Counsel's own words, closed

the case.

As a result, Petitioner has been denied any hearing of the question of her right to backpay for the eleven months disallowed by the General Counsel even though she was to have been made whole, according to the decision of the Board for all "earnings or other monetary losses suffered by her". And now the Court of Appeal has dismissed her Petition for Review of that decision without a hearing. The reason that Petitioner has been denied a hearing both at the Board level and before the Court of Appeal is that the denial of back pay was accomplished by administrative decision and not by Board order. (In fact, as has been pointed out, the Board order specifically directed full monetary compensation by way of back pay).

The result is that two orders denying back pay, one by the Board, and one by the General Counsel, are, in effect, subject to different standards of review, even though they are substantively identical in their effect upon the victim of the unfair labor practice.

As to the second point, the importance of Supreme Court guidance in this area; the question of whether Petitioner should be entitled to review of substantive orders made in the form of administrative deci-

sions reaches far beyond Mrs. Robeson herself, and the ambiguity demonstrated by the case at hand demonstrates this potential effect.

By allowing the state of the law surrounding Section 160(f) to remain unclear, the courts give the NLRB a tactical weapon which can be used to divert otherwise arguably valid claims. This is a result of the fact that working persons like Petitioner do not have the resources to engage in drawn out legal disputes to enforce their rights, and any additional procedural skirmishes which must be fought prior to a hearing on the merits will and does tend to discourage persons with only marginal economic ability to finance legal actions from pursuing otherwise good claims.

Petitioner's case is illustrative. Petitioner, the victim of an unfair labor practice, believes the General Counsel was remiss in denying her back pay claim, particularly without a hearing of any sort. In attempting to bring her case before the Ninth Circuit, she was met with a jurisdictional challenge which was possible only because of the unresolved ambiguities surrounding Section 160(f). Petitoner is a working person, a clerk. The jurisdictional challenge created formidable financial barriers to Petitioner's

ever being heard on the merits of her case for back pay. A decision by this court clarifying the scope of Section 160(f) as it relates to informal administrative acts by the General Counsel could eliminate time-consuming, procedural skirmishes and allow efficient disposition on the merits of aggrieved persons' contentions, while removing from General Counsel the temptation to use administrative methods to dispose of close or difficult cases in an attempt to avoid judicial review.

The NLRB is the sole recourse for persons in Petitioner's situation. That statutory scheme is a sensible, efficient means of solving labor disputes when an independent judiciary stands by to review NLRB decisions, as provided in Section 160(f). Where Section 160(f) is construed to deny jurisdiction to review actions of the General Counsel which have the same effect as Board orders, then Petitioner is denied protection from arbitrary or ill-considered substantive decisions of labor law unless he has the financial ability to put forward memoranda in opposition to motions to dismiss and then to review dismissals. Most persons in charging party's position do not have such ability.

CONCLUSION

For these reasons, a writ of certio-

rari should issue to review the order of the Ninth Circuit.

Respectfully submitted,

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FILED

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EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALDINE ROBESON,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 78-1843

NLRB # 20 CA 10401
San Franciso NLRB

ORDER

Before: GOODWIN and ANDERSON, Circuit Judges.

Upon due consideration, the Court enters the following order:

(a) petitioner's motion for extension of time is granted and petitioner's opposition to the motion to dismiss, heretofore received, is ordered filed; and

(b) the petition is dismissed for lack of jurisdiction.

FILED

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EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 78-1843

NLRB # 20 CA 10401
San Francisco, CA.

ORDER

Before: GOODWIN and ANDERSON, Circuit Judges.

Upon due consideration, the petition for rehearing is denied.